92-1307

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

SELAIDEN BUILDERS, INC.,
ROBERT SELAIDEN, CHARLES SELAIDEN
AND JACK MCJUNKIN,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER OF VERNON SAVINGS AND
LOAN ASSOCIATION, F.S.A.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation ("FDIC"), as a claimant suing upon a note or guaranty, is held to the same burden of proof in a summary judgment context as other litigants.

2. Whether, if the FDIC's burden on motion for summary judgment of proving that it is the owner and holder of instruments upon which it sues is difficult to meet, the burden then shifts to the defendant to disprove that the FDIC is the owner and holder of the instruments.

3. Whether a legitimate fear exists that the FDIC is not the owner and holder of certain instruments when the FDIC judicially admits that not all assets in a purchase and assumption transaction have been transferred and then fails to proffer evidence that would show whether the instruments sued upon were among the assets that were transferred.

4. Whether the FDIC has satisfied its summary judgment burden of proving owner and holder status by submitting affidavits stating that it is the owner and holder of a note and guaranty, when the affidavits conflict with the judicial admissions of the FDIC, and one affiant subsequently testifies that he did not have personal knowledge of that statement in his affidavit.

LIST OF PARTIES

Petitioners: Selaiden Builders, Inc.,[1] Robert Selaiden, Charles Selaiden and Jack McJunkin

Respondent: Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, F.S.A.[2]

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[1] Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioners certify that there are no parent or subsidiary companies of Selaiden Builders, Inc.

[2] Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioners certify that, upon information and belief, there are no parent or subsidiary companies of the Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, F.S.A.

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FOREWORD

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Unless otherwise indicated, all emphases are supplied by counsel.

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SELAIDEN BUILDERS, INC.,
ROBERT SELAIDEN, CHARLES SELAIDEN
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FEDERAL DEPOSIT INSURANCE CORPORATION,
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Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Selaiden Builders, Inc., Robert Selaiden, Charles Selaiden and Jack McJunkin (collectively, the "McJunkin Group" or "Petitioners") request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") entered on October 1, 1992.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 973 F.2d 1249 (5th Cir. 1992), and is reprinted in full in Appendix A, p. App. 1, below. The (i) order granting summary judgment for Respondent Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, F.S.A. ("Respondent"), (ii) order denying Petitioners' motion to strike, and (iii) judgment of the United States District Court for the Northern District of Texas, Dallas Division ("District Court"), have not been reported. They are reprinted in full in Appendix B, p. App. 14; Appendix C, p. App. 16; and Appendix D, p. App. 20; respectively, below.

JURISDICTION

The Fifth Circuit entered its opinion in this matter on October 1, 1992. *FDIC v. Selaiden Builders, Inc.*, 973 F.2d 1249 (5th Cir. 1992); Appendix A, p. App. 1, below. On October 15, 1992, Petitioners timely filed their petition for panel rehearing, which the Fifth Circuit denied on November 6, 1992. Appendix E, p. App. 23, below. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

RELEVANT STATUTORY PROVISIONS AND RULES

Federal Rule

Fed. R. Civ. P. 56(c) and (e).

State Statutes

Tex. Bus. & Com. Code § 1.201(20) (Vernon Supp. 1993).

Tex. Bus. & Com. Code § 3.201(c) and comment 8 (Vernon 1968).

The text of the foregoing statutory provisions and rules is reproduced in full in Appendix F, p. App. 25, below.

STATEMENT OF THE CASE

A. The Notes and Guaranties

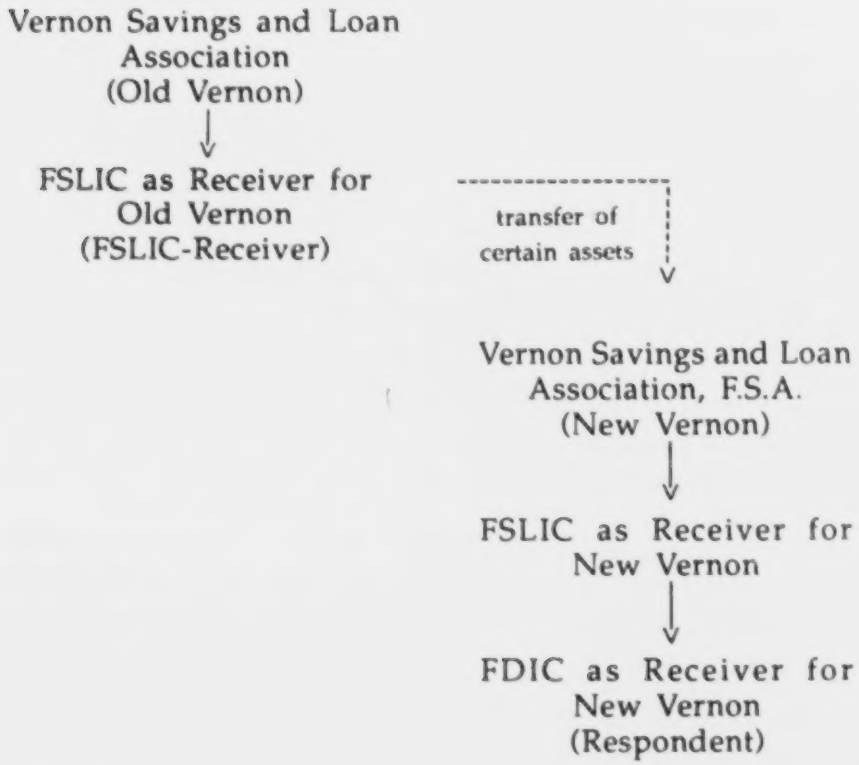
On or about August 24, 1985, Selaiden Builders, Inc. executed two promissory notes, one in the principal amount of $509,800.00 (the "$509,800 Note") and the other in the principal amount of $433,000.00 (the "$433,000 Note") (collectively, the "Notes"), in favor of Vernon Savings and Loan Association ("Old Vernon") for the purchase and construction of an apartment complex. (R. Vol. I, p. 32-42.) Robert Selaiden, Charles Selaiden and Jack McJunkin allegedly executed guaranties ("Guaranties") of the Notes.[3] (R. Vol. I, p. 15-31.)

B. Old Vernon, New Vernon, and Their Receiverships

Subsequently, the Federal Home Loan Bank Board ("FHLBB") declared Old Vernon insolvent and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Old Vernon ("FSLIC-Receiver"). According to the Respondent, in March 1987, only certain

[3] Jack McJunkin's alleged guaranty was limited to sixty percent (60%) of the amount owed on the Notes.

of the assets of FSLIC-Receiver were transferred to a new entity, Vernon Savings and Loan Association, F.S.A. ("New Vernon"). (R. Vol. A, p. 13; Appellee's Brief at 17.) Thereafter, the FHLBB declared New Vernon insolvent and appointed the FSLIC as receiver for New Vernon as well. With the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"),[4] the FDIC ultimately replaced the FSLIC as the receiver for New Vernon. Accordingly, the relationship of Old Vernon, New Vernon and Respondent is as set forth below:


Vernon Savings and Loan Association (Old Vernon)
FSLIC as Receiver for Old Vernon (FSLIC-Receiver)
transfer of certain assets
Vernon Savings and Loan Association, F.S.A. (New Vernon)
FSLIC as Receiver for New Vernon
FDIC as Receiver for New Vernon (Respondent)

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[4] P.L. No. 101-73, 103 Stat. 183 (1989); *see* FIRREA § 401(a), 103 Stat. 354, *codified at* 12 U.S.C. § 1437 note.

C. The Endorsements of the Notes

On February 28, 1987, Old Vernon endorsed the $509,800 Note as payable to the "order of the Federal Home Loan Bank of Dallas." (R. Vol. V, p. 1008-1010.) Thereafter, on January 26, 1990, the Federal Home Loan Bank of Dallas endorsed the $509,800 Note as payable to the order of the FDIC "as manager of the FSLIC Resolution Fund as Receiver of Vernon Savings & Loan [*i.e.*, Old Vernon]."[5] (R. Vol. V, p. 1008-1010.) Thus, the entity to which the $509,800 Note was endorsed was *not* Respondent. No subsequent endorsements appear on the $509,800 Note. Moreover, the $433,000 Note has never been endorsed by Old Vernon (or FSLIC-Receiver) to any other person or entity.

D. The Lawsuit

On January 19, 1989, Respondent filed suit against the McJunkin Group seeking to recover on the Notes and Guaranties. (R. Vol. I, p. 1-50.) Jurisdiction in the District Court was predicated on 12 U.S.C. § 1730(k)(1) and 28 U.S.C. §§ 1331 and 1345. (*Id.*) Thereafter, on February 24, 1989, the McJunkin Group filed their answer asserting numerous affirmative defenses. (R. Vol. I, p. 53-64.)

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[5] FIRREA established the FSLIC Resolution Fund, for which the FDIC acts as manager, to replace the FSLIC as receiver of certain failed savings and loan associations. *See* FIRREA § 215, *codified at* 12 U.S.C. 1821a (1989). In the interest of clarity, this Petition will continue to refer to the receiver of Old Vernon as FSLIC-Receiver.

E. Summary Judgment Proceedings

On January 17, 1990, Respondent moved for summary judgment on the Notes and Guaranties. (R. Vol. A.) Respondent did not, however, present to the District Court any competent proof to establish that it is the owner and holder of the Notes and Guaranties or how it obtained the assets of either Old Vernon or FSLIC-Receiver. Specifically, Respondent did not present to the District Court any summary judgment evidence in the form of endorsements, a purchase and assumption agreement, a bulk transfer agreement, or otherwise to prove which, if any, assets of Old Vernon (or FSLIC-Receiver) were transferred to New Vernon, the entity for which Respondent is now the receiver.

In support of its motion for summary judgment, Respondent submitted only the affidavits of Wilma Howl ("Howl") and Robert D. St. John ("St. John") in an attempt to prove that it was the owner and holder of the Notes and Guaranties. (R. Vol. A, p. 12-18, 77-79.) Significantly, however, neither affiant (i) explained the endorsements, or lack thereof, on the Notes, or (ii) submitted a copy of the alleged purchase and assumption agreement, which, according to the admissions of Respondent, allegedly transferred *only certain* assets from FSLIC-Receiver to New Vernon. (*Id.*) Furthermore, St. John later recanted the statements in his affidavit by testifying that he did not have personal knowledge as to whether Respondent was the owner and holder of the Notes and Guaranties. (R. Vol. V, p. 999.)

Petitioners moved to strike the affidavits of Howl and St. John. (R. Vol. II, p. 432-443; Vol. D.) The District

Court denied the motion to strike and initially denied the Respondent's motion for summary judgment (with the exception of granting summary judgment as to Petitioners' counterclaim of breach of good faith and fair dealing). Appendix C, p. App. 16, below. Following the filing of a motion for reconsideration, the District Court reversed itself without explanation on February 28, 1991, and granted summary judgment. Appendix B, p. App. 14, below. Thereafter, on July 2, 1991, the District Court entered a final judgment in favor of Respondent. Appendix D, p. App. 20, below.

F. Opinion of the Fifth Circuit

The Fifth Circuit affirmed in part and reversed in part the District Court's holding, and remanded the case to the District Court for further proceedings consistent with its opinion. 973 F.2d 1249, 1255 (5th Cir. 1992); Appendix A, p. App. 1, below. Specifically, the Fifth Circuit reversed the summary judgment as to the $509,800 Note but upheld the summary judgment as to the $433,000 Note. *Id.* at 1255; p. App. 13, below.

In support of its holding, the Fifth Circuit stated that it would not "impose a standard so strict that summary judgment would be all but impossible for plaintiffs in cases such as these." *Id.* at 1254; p. App. 10, below. Based on this admittedly result-driven policy, the Fifth Circuit impermissibly shifted the burden of proof to the McJunkin Group to prove that Respondent was *not* the owner and holder of the Notes and Guaranties without first finding that Respondent had presented sufficient evidence that it was the owner and holder. In this regard,

the Fifth Circuit stated that it would reverse the summary judgment only if the McJunkin Group had a "legitimate fear" that Respondent was not the owner and holder of the Notes and Guaranties and some other entity might demand payment on the disputed instruments. *Id.* The Fifth Circuit found that the McJunkin Group had established such a legitimate fear as to the $509,800 Note due to such note's endorsement to the FDIC as receiver for Old Vernon and, therefore, reversed the judgment as to such note. However, it found that the McJunkin Group had not established a legitimate fear as to the $433,000 Note and Guaranty.

The McJunkin Group filed a Petition for Rehearing in which they expressly argued to the Fifth Circuit that, as with the $509,800 Note, Respondent had not met its burden of proof that it was the owner and holder of the $433,000 Note and Guaranty. The Fifth Circuit declined, however, to rehear the matter. Appendix E, p. App. 23, below.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Decision to Shift the Burden of Proof to the Petitioners Before Respondent Satisfied its Burden of Proof Creates a Direct and Apparent Conflict With the Decisions of the Supreme Court, Other Circuit Courts, and Within the Fifth Circuit Itself and Raises Issues of Exceptional Federal Importance

This is a case of exceptional importance involving a claimant's burden of proof on a motion for summary

judgment and, in particular, the summary judgment burden that the FDIC must meet in order to prevail in a suit on a note and guaranty. In response to the well-documented problems of the banking and savings and loan industries, the Fifth Circuit adopted a result-oriented policy favoring the FDIC in summary judgment cases. Rather than holding Respondent to its burden of proof as established by well-settled case law, the Fifth Circuit ignored the guidelines and the policies enunciated by this Court and eviscerated the strict summary judgment standard for a particular class of litigants.

1. The Established Summary Judgment Standard

In setting forth the standard for summary judgment, Rule 56(c) of the Federal Rules of Civil Procedure provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Thus, "if the movant bears the burden of proof on an issue, . . . he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. UpJohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original); *see John v. State of La. (Bd. of Trustees for State*

Colleges and Univ.), 757 F.2d 698, 707-708 (5th Cir. 1985). Only *after* the movant has established that there is no genuine issue of material fact must the opponent come forward to establish the existence of a material fact. *Celotex Corp.*, 477 U.S. at 323-24. As this Court previously stated:

> [T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; *and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.*

Adickes v. S.H. Kress and Co., 398 U.S. 144, 161 (1970), *citing*, 6 J. Moore, Moore's Federal Practice ¶ 56.22[2] p. 2824-25 (2d ed. 1966); *see also* 1963 Advisory Committee Notes to Fed. R. Civ. P. 56(e).

Relying upon these well-established principles, the other circuit courts and the Fifth Circuit itself have held that a proponent of a motion for summary judgment, who bears the burden of proof on the ultimate issue at trial, must establish all of the elements of its claim before the burden of proof shifts to the opponent of the summary judgment motion to either disprove the proponent's claim or to establish its own affirmative defenses. *See, e.g., National State Bank v. Federal Reserve Bank of New York*, 979 F.2d 1579, 1581 (3d Cir. 1992); *RTC v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992); *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986); *Broomall Indus. v. Data Design Logic Sys.*, 786 F.2d 401, 405 (Fed. Cir. 1986); *Fontenot v. UpJohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir.

1981); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973).

2. The Fifth Circuit's Deviation From The Established Standard

In the present case, the Fifth Circuit rejected this well-settled case law and enacted a new standard for a certain class of plaintiffs, which directly contravenes the holdings of this Court and the policies underlying the Federal Rules of Civil Procedure. Rather than holding Respondent to its burden of proof that it was the owner and holder of the Notes and Guaranties,[6] the Fifth Circuit stated that it did not seek to "impose a standard so strict that summary judgment would be all but impossible on plaintiffs in cases such as these." 973 F.2d at 1254; p. App. 10, below. Accordingly, the Fifth Circuit relaxed the burden of proof on Respondent and shifted the burden of proof to the McJunkin Group to prove that Respondent was not the owner and holder by establishing a "legitimate fear" that they might be compelled to pay twice under the Notes and Guaranties.

By focusing its holding on "plaintiffs in cases such as these," the Fifth Circuit apparently limited its relaxed

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[6] In order to recover under the Notes and Guaranties, Respondent had the burden of proof to establish that (i) the McJunkin Group executed such instruments, (ii) Respondent is the present owner and holder of such instruments, and (iii) the Notes and Guaranties are in default. *FDIC v. McCrary*, 977 F.2d 192, 194 n.5 (5th Cir. 1992).

burden of proof standard to the FDIC.[7] An examination of other Fifth Circuit cases confirms that this relaxed burden of proof has not been extended to other plaintiffs. *See, e.g., Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973). Instead, the Fifth Circuit first announced this new policy in *RTC v. Camp*, 965 F.2d 25 (5th Cir. 1992), a case decided one month after the McJunkin Group's oral argument before the Fifth Circuit, and has continued to apply the more lenient standard in FDIC cases. *See FDIC v. McCrary*, 977 F.2d 192 (5th Cir. 1992).

In addition to treating similarly situated litigants differently, the Fifth Circuit's holding creates a conflict among the circuits, since no other circuit court has created a similar exception for the FDIC with respect to its summary judgment burden. In fact, at least one other court declined to apply such a relaxed standard to the FDIC in a summary judgment context. *See, e.g., RTC v. Gill*, 960 F.2d 336 (3rd Cir. 1992) (summary judgment reversed since RTC, as the summary judgment movant, did not fulfill its burden of proving its claim). Therefore, the Fifth Circuit's decision to carve out an exception to

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[7] The Fifth Circuit has also applied its relaxed burden of proof to the Resolution Trust Corporation ("RTC") (*see RTC v. Camp*, 965 F.2d 25 (5th Cir. 1992)), and presumably would not differentiate between the corporate and receivership capacities in which those agencies may act. In the interest of brevity, therefore, this Petition will refer generally to the class of cases the Fifth Circuit was describing as FDIC cases, although the plaintiff might actually be the FSLIC or RTC.

settled summary judgment standards exclusively for the FDIC creates a conflict among the circuits.

Most importantly, the Fifth Circuit's decision to venture into the field of policy-making on behalf of the federal banking agencies must be addressed by this Court. The Fifth Circuit's new standard creates potentially devastating results for thousands of defendants throughout the country. Over the last ten years, the FDIC has become the receiver of numerous financial institutions and has initiated thousands of collection lawsuits. Unless the FDIC in its capacity as receiver of a particular financial institution can prove that it is the actual owner and holder of the instruments upon which it sues, the defendants in these suits could be subjected to double liability. For example, in the present case, although Respondent claimed that it was the owner and holder of the $509,800 Note, such note was actually endorsed to FSLIC-Receiver, the receiver for Old Vernon.

Moreover, the defendant in an FDIC lawsuit is usually not in a position to prove whether the FDIC is actually the owner and holder of the instrument sued upon, since the defendant does not have possession of the necessary documentation. While the FDIC may argue that it is difficult for it, in the context of a bank's failure and the transfer of its assets to a new entity, to be able to prove its status as the owner and holder of a particular note, it is obviously more difficult for a defendant, without access to the bank's or FDIC's records, to disprove

that element of the FDIC's claim. Accordingly, in the present case, the Fifth Circuit should not be allowed to stray from well-established burden of proof principles by shifting to the McJunkin Group the burden of proving that Respondent was not the owner and holder of the Notes and Guaranties.

Furthermore, contrary to the holding of the Fifth Circuit in the present case, Respondent was not faced with an impossible summary judgment burden. In this regard, Respondent claimed both in its brief and oral argument to the Fifth Circuit that (i) the alleged purchase and assumption agreement between the FSLIC-Receiver and New Vernon, and (ii) the resolutions of the FHLBB, would both establish its ownership and holder status of the Notes and Guaranties. (Appellee's Brief at 12-13.) Respondent inexplicably failed, however, to introduce either document into evidence in the District Court below. Since Respondent claimed that it possessed evidence which would establish its ownership and holder status but did not tender such evidence to the District Court, by definition it is not faced with an "all but impossible" summary judgment burden. To the contrary, it has simply *failed to meet* its summary judgment burden. More importantly, the mere fact that it did not submit evidence of a purchase and assumption agreement or any other type of transfer agreement, a document which the FDIC routinely tenders into evidence in other note cases, presents a glaring red flag that Respondent may not be the owner and holder of the $433,000 Note and Guaranty. Why else would it not have offered such evidence?

Rather than introduce competent summary judgment proof, Respondent attempted to rely on the affidavits of

St. John and Howl to establish that it was the owner and holder of the Notes and Guaranties. Indeed, Respondent will presumably attempt to dissuade this Court from reviewing the Fifth Circuit's impermissible shifting of the summary judgment burden by arguing that this case involves merely the sufficiency of its summary judgment evidence and is not worthy of consideration by this Court. Nothing could be further from the truth. As set forth below, there is no question but that the evidence actually proffered by Respondent was insufficient to establish a right to summary judgment. The Fifth Circuit acknowledged as much in its statement that, "in cases such as these," the burden of proof should be shifted to the non-movant.

The Howl and St. John affidavits, which contained only conclusory assertions that Respondent was the owner and holder of the Notes and Guaranties, were clearly insufficient under Texas law. In this connection, the St. John affidavit is analogous to the affidavit submitted in *FDIC v. Clark*, No. 91-8259 (5th Cir. March 16, 1992) (per curiam) (unpublished), Appendix G, p. App. 28, below, which was rejected by the Fifth Circuit. In *FDIC v. Clark*, the Fifth Circuit held that, "[t]he mere opinion or conclusion of what the records show, expressed by a non-custodian affiant not employed until after the alleged transfer, *establishes nothing*." *Id.* at 2. As in *Clark*, the evidence in the present case established that St. John was a noncustodial affiant who was not employed until after the alleged transfer. (R. Vol. E, p. 16-18, 25.)

Moreover, the Howl affidavit did not even address holder status, but merely asserted the conclusory statement that Respondent is the owner of the Notes. *See*

Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985); *Broadway v. City of Montgomery, Alabama*, 530 F.2d 657, 660 (5th Cir. 1976) (affidavit containing nothing more than a recital of unsupported obligations, conclusory in nature, was insufficient summary judgment evidence). In addition, as evidenced above, the Howl affidavit and the St. John affidavit were both undercut by Respondent's own judicial admission that not all of the assets of FSLIC-Receiver were transferred to New Vernon. In fact, all that these two affidavits competently do establish is that Respondent possessed the instruments, which is not enough to prove ownership or holder status. *FDIC v. McCrary*, 977 F.2d 192, 195 n.8 (5th Cir. 1992); *RTC v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992); *see Lawson v. Finance America Private Brands, Inc.*, 537 S.W.2d 483, 485 (Tex. Civ. App.—El Paso 1976, no writ) (party must account for its possession by proving the transaction through which it acquired the instruments); *Texas State Bank & Trust Co. v. St. John*, 103 S.W.2d 1104, 1108 (Tex. Civ. App.—El Paso 1937, writ dism'd) (mere possession alone is insufficient evidence of title and ownership); Tex. Bus. & Com. Code §§ 1.201(20), 3.201(c) comment 8 (to be a holder, the note must be drawn, issued, or endorsed to claimant, or to his order, or to bearer, or in blank). Moreover, since the same two affidavits were offered in support of Respondent's claim on both the $433,000 Note and the $509,800 Note, and since the two affidavits were *not* sufficient evidence in the eyes of the Fifth Circuit to conclusively establish that Respondent is the holder of the $509,800 Note, this evidence clearly is *not* sufficient to prove that Respondent is the owner and holder of the $433,000 Note.

In the final analysis, the Fifth Circuit simply rejected the proper allocation of the burden of proof in the summary judgment context and, instead, adopted a policy favoring Respondent. This approach conflicts directly with the principles announced by this Court and set forth in Rule 56 of the Federal Rules of Civil Procedure, which requires a movant, including the FDIC, who ultimately bears the burden of proof at trial, to produce evidence of all of the elements of its case before requiring the nonmovant to defend the case. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The standard adopted by the Fifth Circuit in the present action, however, effectively eviscerates this principle for the benefit of the FDIC. By virtually eliminating the burden of proof on the FDIC, the Fifth Circuit has ignored the guidelines and the policies enunciated by this Court and has established an apparent and a direct conflict with the decisions of this Court, other circuit courts, and with its own former decisions, as set forth above. This Court should not condone the Fifth Circuit's departure from well-settled case law for the purpose of policy-making on behalf of the FDIC. Therefore, before the Fifth Circuit continues to apply, or potentially expand, this relaxed summary judgment standard, this Court should grant certiorari and address these conflicts and this important policy issue.

B. The Fifth Circuit's Decision that the McJunkin Group Did Not Prove a Legitimate Fear that Respondent Was Not the Owner and Holder of the $433,000 Note and Guaranty Creates a Direct and Apparent Conflict Within the Fifth Circuit Itself

Finally, even if the burden of proof had been properly shifted to the McJunkin Group, which they deny, the Fifth Circuit's decision that the McJunkin Group did not establish a "legitimate fear" that Respondent was not the owner and holder of the $433,000 Note and Guaranty directly conflicts with other Fifth Circuit decisions where it found such a legitimate fear. Indeed, the facts in the present case are directly parallel to, and are no less compelling than, the facts in *FDIC v. McCrary*, 977 F.2d 192 (5th Cir. 1992), and *FDIC v. Clark*, No. 91-8259 (5th Cir. March 16, 1992) (per curiam) (unpublished), Appendix G, p. App. 28, below,[8] where such a "legitimate fear" was found. The only evidence that created a legitimate fear in *McCrary* and *Clark* was evidence that only certain unnamed assets were transferred to the plaintiff, an FDIC entity, whereas others were transferred to a bank other than the plaintiff. There did not appear, however, to be any proof in *McCrary* and *Clark* as to whether the instrument sued upon was in fact transferred to the plaintiff FDIC or to the other bank.

Similarly, in the present case, Respondent judicially admitted in its motion for summary judgment filed with

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[8] The facts of *Clark* are recited by the Fifth Circuit in *FDIC v. McCrary*, 977 F.2d 192 (5th Cir. 1992), and in *RTC v. Camp*, 965 F.2d 25, 29, n.1 (5th Cir. 1992).

the District Court below and in its brief to the Fifth Circuit that only "certain assets" of the FSLIC-Receiver were transferred to New Vernon. (R. Vol. A, p. 13; Appellee's Brief at 17.) By definition, if *all* assets were *not* transferred, then someone other than Respondent has to be the owner and holder of certain of the assets. Indeed, some of the assets may have remained with FSLIC-Receiver, in which event, the McJunkin Group would have no protection against double liability.[9] Simply put, the glaring problem with Respondent's proof in this case is that there is no competent proof that the $433,000 Note and Guaranty were among the assets included in those comprising the "certain assets" that were transferred.

Accordingly, since (i) the record below established that not all assets were transferred from the FSLIC-Receiver to New Vernon, and (ii) Respondent cannot from the competent evidence presented below establish that the $433,000 Note was one of the assets that was transferred, the same legitimate fear that was present in *McCrary* and *Clark* is also present in this case. Therefore, since the Fifth Circuit's decisions in *McCrary* and *Clark* are in direct conflict with the Fifth Circuit's decision in this case, this Court should address and correct this conflict.

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[9] For example, the $509,800 Note apparently remained with FSLIC-Receiver according to the endorsements thereon.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

FEDERAL DEPOSIT INSURANCE CORPORATION, As Manager of the FSLIC Resolution Fund as Receiver For Vernon Savings and Loan Association, FSA, Plaintiff-Appellee,

v.

SELAIDEN BUILDERS, INC., Robert Selaiden, Charles Selaiden, and Jack McJunkin, Defendants-Appellants.

No. 91-1815.

United States Court of Appeals,
Fifth Circuit.

Oct. 1, 1992.

Alan S. Loewinsohn, Jennifer A. Haltom Doan, Figari & Davenport, Dallas, Tex., for defendants-appellants.

Michelle Kosse, Counsel, Arter & Hadden, F.D.I.C., Washington, D.C., William G. Compton, Neil M. Sunkin, Arter & Hadden, Dallas, Tex., for F.D.I.C. as Receiver of Vernon Sav. & Loan Assoc.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, SMITH and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This action involves certain notes and guaranties executed for the purchase and construction of an apartment project known as the University Crossroads Condominiums. The defendants appeal the summary judgment granted against them in favor of the FDIC-Receiver, alleging that the FDIC-Receiver failed to establish that it was the owner and holder of the notes and guaranties. We affirm in part and reverse in part.

I

Selaiden Builders, Inc. (Selaiden Builders) executed in favor of Vernon Savings & Loan Association (Old Vernon) one note in the amount of $343,000 (Vernon Note #1 – the secured loan)[1] and another note in the amount of $232,000 (Vernon Note #2 – the unsecured loan). As part of the transaction involving the Vernon Notes, Robert Selaiden, Charles Selaiden, and Jack McJunkin each

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[1] According to the complaint, "The Note was secured by a Subordinate Lien Deed of Trust and Security Agreement, granting a second lien in . . . property known as University Crossroads Condominiums." Record on Appeal, vol. 1, at 3, *FDIC v. Selaiden Builders, Inc.*, No. 91-1815 (5th Cir. filed Aug. 12, 1991) ["Record on Appeal"]. This note "was subordinate to a $4,130,800.00 loan and deed of trust granting a first lien on the same property, and payable to RepublicBank Dallas." *Id.* The lien had been granted to RepublicBank in exchange for a deed of trust note to the University Springs Joint Venture in the principal amount of $4,130,800 (the USJV Note). Record on Appeal, vol. D, at 34. The USJV Note was executed by Dondi Residential Properties, Inc. (DRIPI) and was guaranteed (the USJV Guaranty) by Don Dixon and Dondi Residential Properties, Inc. – which was a wholly-owned subsidiary of Old Vernon. Prior to the initiation of this lawsuit, RepublicBank foreclosed on its lien on the University Crossroads Condominiums. It did not, however, fully recover the remaining balance on the USJV Note. As a result of the foreclosure, Vernon Note # 1 became unsecured. Following RepublicBank's foreclosure on the USJV Note, RepublicBank was placed into receivership, and the FDIC as receiver for RepublicBank assigned the remaining balance on the USJV Note, as well as the USJV Guaranty, to NCNB Texas National Bank (NCNB). Approximately one month after this lawsuit was commenced, Jack McJunkin purchased from NCNB the USJV Note and the USJV Guaranty.

executed unconditional guaranties on both notes.[2] The following year, Selaiden Builders renewed the Vernon Notes – to $509,800 and $433,000, respectively – and the maturity date for both notes was extended a year. The original guarantors also executed renewal agreements.[3] After the notes became due, the defendants defaulted on their obligations.

The Federal Home Loan Bank Board (FHLBB) declared Old Vernon insolvent and appointed the FSLIC as receiver for Old Vernon. Simultaneously, the FHLBB created Vernon Savings and Loan Association, F.S.A. (Vernon, F.S.A.), and approved an acquisition agreement between the FSLIC as receiver for Old Vernon and Vernon, F.S.A., whereby Vernon, F.S.A. acquired substantially all the assets of Old Vernon. The FHLBB appointed the FSLIC as receiver for Vernon, F.S.A., which entity then succeeded to the assets of Vernon, F.S.A.

The FSLIC as receiver for Vernon, F.S.A. filed this lawsuit against Selaiden Builders, Robert Selaiden, Charles Selaiden, and Jack McJunkin to recover on the notes and guaranties executed in favor of Old Vernon. The defendants answered the lawsuit, asserting several affirmative defenses, and, in addition, the defendants asserted a counterclaim and a claim of offset based on the

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[2] The guaranties were continuing in nature and covered renewals, extensions, and modifications of the original notes. Record on Appeal, vol. A, at 55-70.

[3] Jack McJunkin's guaranty was limited to 60 percent of the amounts owed on the notes. Record on Appeal, vol. A, at 30; *id.* at 45.

deficiency on the USJV Note that Jack McJunkin acquired prior to suit.[4]

The FDIC as receiver for Vernon, F.S.A. (FDIC-Receiver)[5] filed a motion to sever the defendants' counterclaim and claim of offset and also a motion for summary judgment on the notes and guaranties.[6] Thereafter, the defendants moved to strike the affidavits of Robert St. John and Wilma Howl (the Affidavits) – which the FDIC-Receiver submitted in support of its motion for summary judgment. The district court denied this motion, and issued an order which (i) granted the FDIC-Receiver's motion to sever, ruling that "[t]he Court, in its discretion, is of the opinion that the counterclaim and claim of offset

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[4] *See supra* note 1. The defendants contend that the plaintiff is liable for these liabilities. *See* Record on Appeal, vol. 1, at 61-62.

[5] The FDIC-Receiver replaced the FSLIC as receiver for Vernon, F.S.A. pursuant to the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), P.L. No. 101-73, 103 Stat. 183 (1989). *See* FIRREA § 401(a), 103 Stat. 354, *codified at* 12 U.S.C. § 1437 note.

[6] The summary judgment evidence submitted by the FDIC-Receiver consisted of: (i) Resolution No. 87-1191 – Appointment of Receiver for Vernon Savings and Loan Association, F.S.A.; (ii) $343,000 Subordinate Lien Deed of Trust Note; (iii) Renewal, Extension, Increase and Modification Agreement for the $343,000 Note; (iv) $509,800 Renewal, Extension, Increase and Modification Subordinate Lien Deed of Trust Note; (v) Renewal, Extension, Increase and Modification Agreement for $232,000 Note; (vi) $433,000 Renewal, Extension, Increase and Modification Note; (vii) Unconditional Guaranties; (viii) FSLIC as Receiver for Vernon F.S.A. Interest Calculation Printouts as of January 8, 1990; (ix) Affidavit of Robert St. John; and (x) Affidavit of Wilma Howl.

should be severed"; and (ii) granted the FDIC-Receiver's summary judgment motion only to the extent that "the defendants' affirmative defense/counterclaim of breach of good faith and fair dealing is barred as a matter of law." Record on Appeal, vol. 3, at 526.

Upon the FDIC-Receiver's motion for reconsideration of the partial denial of the summary judgment motion, the district court granted the FDIC-Receiver's motion for summary judgment. The district court denied defendants' motion to reconsider, and entered judgment in favor of the FDIC-Receiver. The defendants now appeal, contending that the district court erred by severing the defendants' claims arising out of the USJV Note and by granting the FDIC-Receiver's motion for summary judgment.

II

A

The defendants contend that the district court erred in severing the claims arising out of the USJV Note.[7] The

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[7] The defendants contend initially that their recoupment claim was not severed in the July order because: (i) the FDIC-Receiver did not mention the recoupment claim in its motion to sever and (ii) the July order referred only to the counterclaim and the affirmative defense of offset.

The district court's order contains the following language:

> The plaintiff filed this action in January, 1989, seeking recovery on two promissory notes. Jack McJunkin, Charles Selaiden and Robert Selaiden filed their answers, and as well asserted a counterclaim and claim of offset against the Federal Savings and Loan Insurance Corporation, the predecessor to the

defendants allege that the FDIC-Receiver did not sustain its burden of proving that a severance should be granted and none of the factors favoring severance was present in this case. The defendants also contend that the Vernon Notes and the USJV Note and USJV Guaranty are both liquidated claims, concerning the same transaction or occurrence.

The determination whether to grant a motion to sever a counterclaim rests with the broad discretion of the district court. *See United States v. 499.472 Acres of Land More or Less*, 701 F.2d 545, 549-50 (5th Cir.1983). We will overrule a district court's decision to order a severance

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> plaintiff. The plaintiff has moved to sever the counterclaim and claim of offset of the three defendants *which arises out of a RepublicBank/Dallas promissory note* [USJV Note], other than the two upon which the plaintiff seeks recovery. The Court, in its discretion, is of the opinion that the counterclaim and claim of offset should be severed. Such counterclaim and claim of offset raised by Jack McJunkin, Charles Selaiden and Robert Selaiden is hereby severed from the above-captioned action for separate disposition.

Record Excerpts, tab 2, at 2, *FDIC v. Selaiden Builders, Inc.*, No. 91-1815 (5th Cir. filed Sept. 20, 1991) (emphasis added).

The defendants read this language such that the recoupment claim survives the severance ordered by the district court. We do not read this language so narrowly. The district court explicitly refers to claims *which arise out of* the USJV Note – other than the Vernon Notes upon which the plaintiff seeks recovery. We read this language as severing all claims arising out of the USJV Note and Guaranty. This necessarily encompasses the defendants' claim of recoupment, and we therefore find that this claim was severed from the FDIC-Receiver's main action.

only upon a showing that the district court abused its discretion. *Fidelity & Casualty Co. v. Mills*, 319 F.2d 63 (5th Cir.1963). A district court may order a severance when it determines that severance is "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy." Fed.R.Civ.P. 42(b). A district court may sever a case upon its own motion. *Mills*, 319 F.2d at 63.

We find that the district court properly exercised its discretion in severing the defendants' claims arising out of the USJV Note from the FDIC-Receiver's action. First, the defendants' claims arising out of the USJV Note and its claims arising from the Vernon Notes and Guaranties are unrelated.[8] Second, the University Crossroads Condominiums – which the defendants allege is the common collateral to both the USJV Note and the Vernon Notes – were sold and the lien released before this lawsuit was initiated and before Jack McJunkin bought the USJV Note.[9] The defendants' claim on the deficiency on the USJV Note did not arise at the same time as the plaintiff's claim on the Vernon Notes and Guaranties and does not involve the same parties. Indeed, the claim on the deficiency on the USJV Note has nothing in common with the FDIC-Receiver's claim on the Vernon Notes and Guaranties. Accordingly, we hold that the district court properly exercised its broad discretion in severing the defendants' claims based on the USJV Note purchased by McJunkin.

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[8] *See supra note 1.*

[9] *Id.*

B

Defendants assert that the district court erred in granting summary judgment in favor of the FDIC-Receiver. This court has noted that "suits on promissory notes provide fit grist for the summary judgment mill." *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir.1988). Summary judgment is appropriate if the movant demonstrates that there is an absence of genuine issues of material fact. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.1992). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Such a showing entitles the movant to judgment as a matter of law. Fed.R.Civ.P. 56(c). The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine material fact issues. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the movant produces such evidence, the nonmovant must then direct the court to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *See id.* at 323-24, 106 S.Ct. at 2553. In considering the defendants' challenge to this summary judgment, we review the record de novo. *See Topalian*, 954 F.2d at 1131.

The defendants contend that the district court erred in granting summary judgment because the FDIC-Receiver failed to establish that it is the owner and holder of the notes and guaranties. The defendants allege that the FDIC-Receiver did not establish that the notes and guaranties were transferred from (i) Old Vernon to the FSLIC as receiver for Old Vernon, then to (ii) Vernon,

F.S.A., then to (iii) the FSLIC as receiver for Vernon, F.S.A., and then to (iv) the FDIC-Receiver. Specifically, according to the defendants, the FDIC did not prove that the notes and guaranties were transferred from Old Vernon to Vernon, F.S.A.[10] At oral argument, the FDIC-Receiver conceded that the Purchase & Assumption Agreement verifying the transfer from the FSLIC as receiver for Old Vernon to Vernon, F.S.A. is not in the record, but asserted that there is nonetheless sufficient evidence to establish that the FDIC-Receiver is the owner and holder of the Notes and Guaranties.

In order to recover under the Vernon Notes and Guaranties, the FDIC-Receiver must establish that: (1) the defendants signed the notes and the guaranty agreements; (2) the FDIC-Receiver is the present owner or holder of the notes and the guaranty agreements; and (3) the notes are in default. *See RTC v. Marshall*, 939 F.2d 274, 276 (5th Cir.1991); *see also B.L. Nelson & Assocs. v. Sunbelt Sav.*, 733 F.Supp. 1106, 1109-10 (N.D.Tex.1990); *FSLIC v. Atkinson-Smith Univ. Park Joint Venture*, 729 F.Supp. 1130, 1132 (N.D.Tex.1989).

Recently, in *RTC v. Camp*, 965 F.2d 25 (5th Cir.1992), this court addressed an appeal from a summary judgment on a note in favor of the RTC. In *Camp*, the RTC did not produce the original note upon which it sought recovery, but rather it submitted a copy of the note, along with several affidavits. One affiant testified that the photocopy

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[10] The defendants suggest that the notes and guaranties may have remained with the FSLIC as receiver for Old Vernon.

was a true and correct copy of the note. The other affidavits submitted by the RTC contained statements that the RTC took possession and ownership of the failed institution's assets, including the note in question. In examining whether the RTC had met its summary judgment burden, the court initially "acknowledge[d] the fact that mere possession of the original of an unendorsed note payable to the order of another is not alone sufficient evidence under Texas law to prove that one is the owner and holder."[11] The court, however, also acknowledged the jurisprudence of this circuit which seeks not to impose a standard so strict that summary judgment would be all but impossible for plaintiffs in cases such as these. *Id.* at 29. The court then remarked that it "would not hesitate to reverse summary judgment had Appellants pointed to evidence in the record to the effect that they had a legitimate fear that the RTC was not the owner and holder of the note in question and that some other entity might later approach them demanding payment." *Id.* In that event, affidavits attesting that the RTC had taken possession of the assets of the failed institution would be insufficient to support the summary judgment. *Id.* However, because the defendants in *Camp* failed to point to anything in the record to establish their legitimate fear that an entity other than the RTC owns and holds the note, summary judgment was appropriate. *Id.* at 29-30.

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[11] *Id.* at 29, *citing Jernigan v. Bank One*, 803 S.W.2d 774, 776-77 (Tex.App.--Houston [14th Dist.] 1991, no writ).

Applying the *Camp* standard to this case, we find that, with respect to one of the Vernon Notes, the defendants have pointed to some summary judgment evidence to establish their legitimate fear that the FDIC-Receiver is not the holder of the notes and guaranties. Robert St. John, an asset manager of the FDIC-Receiver, testified that the FDIC-Receiver is the owner and holder of both the Vernon Notes and Guaranties. Wilma Howl, a documentation supervisor for the FDIC-Receiver, testified that the FDIC-Receiver is the current owner of the Vernon Notes and Guaranties and that they were previously owned by the FSLIC as receiver, by Vernon, F.S.A., and by Old Vernon.[12] Howl also testified that the copies of the

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[12] The defendants contend that the district court erred in not striking the Affidavits because they contain unsupported conclusory statements, and are based on hearsay – and not on the personal knowledge of the affiants. Rule 56(e) of the Federal Rules of Civil Procedure provides, in part, that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . " *Id; see also Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir.1980). This court has, however, recently sanctioned the proffer of affidavits supporting a summary judgment, against a challenge to the affidavits which stated that, because "while the affiants had personal knowledge that RTC took over assets of the failed institutions, they had no precise personal knowledge of [the] particular note [sued upon]." *RTC v. Camp*, 965 F.2d 25,29 (5th Cir.1992). In his affidavit, St. John states that the facts concerning the FDIC-Receiver's ownership of the Vernon Notes and Guaranties are based on his review of the FDIC-Receiver's business records. Howl states in her affidavit that the statements made therein are within her personal knowledge as a result of her position as documentation supervisor for the FDIC-Receiver and for the FSLIC as receiver for Vernon, F.S.A.,

Vernon Notes and Guaranties were true and correct copies of the originals.

The defendants contend that, although there are several indorsements on Vernon Note # 1, because none of those is to the FDIC-Receiver in the capacity in which it now sues, the defendants are at risk of multiple exposure on the same claim. The most recent indorsement on Vernon Note # 1 does contain the following language: "Pay to the order of Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund as Receiver of Vernon Savings & Loan" (Old Vernon). The FDIC-Receiver asserts, however, that all that is missing from this indorsement are the words "Association" and "F.S.A." The FDIC-Receiver also notes that the entity "the FDIC as Manager of the FSLIC Resolution Fund as Receiver for Vernon Savings & Loan" does not and never has existed. Appellee's Brief, at 17 n. 11, *FDIC v. Selaiden Builders, Inc.*, No. 91-1815 (5th Cir. filed Nov. 27, 1991). However, there is no summary judgment evidence to support the FDIC's contention regarding the nonexistence of this entity. We hold that the indorsement to the "Federal Deposit Insurance Corporation as Manager of the

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and as a result of her position as assistant compliance officer for Vernon, F.S.A. and for Old Vernon. Howl also states that she is the custodian of the records and that she has held that position continuously since 1984. Moreover, Howl specifically referenced each of the Vernon Notes and Guaranties in question. We find that, based on the affiants' personal knowledge and on their positions for the FDIC-Receiver and its predecessors, the affiants were competent to testify as to the FDIC-Receiver's status as owner and holder of the Vernon Notes and Guaranties. *See Camp*, 965 F.2d at 29; *see also FSLIC v. Atkinson-Smith Univ. Park Joint Venture*, 729 F.Supp. 1130, 1132 (N.D.Tex.1989).

FSLIC Resolution Fund as Receiver of Vernon Savings & Loan" is the type of evidence contemplated by *Camp* which establishes a real question as to the identity of the owner and holder of Vernon Note # 1. *See id.* at 29 n. 1. Therefore, we reverse the grant of summary judgment on Vernon Note # 1.

Regarding Vernon Note # 2, however, the defendants failed to produce or point to any summary judgment proof to establish their legitimate fear that the FDIC-Receiver is not the owner and holder of Vernon Note # 2. Therefore, we find the affidavits are sufficient with respect to Vernon Note #2 and we affirm the grant of summary judgment on Vernon Note # 2.

III

For the foregoing reasons, we AFFIRM in part and REVERSE in part and REMAND for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC Resolution Fund as Receiver for Vernon Savings and Loan Association, FSA, Plaintiff,	)	Civil Action No. CA-3-89-0153-C
v.	)	
SELAIDEN BUILDERS, INC., et al., Defendants.	)	

ORDER

(Filed Feb. 28, 1991)

This matter is before the Court on the FDIC's Motion for Reconsideration or Clarification. After reviewing the motion and arguments of counsel, the Court is of the opinion that the motion should be **GRANTED.**

Summary judgment is appropriate where the record reveals that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. When a motion for summary judgment is made and supported as provided in Rule 56, the adverse parties may not rest upon allegations or denials of their pleadings, but must respond by setting forth specific facts showing that there

is a genuine issue for trial. Rule 56(e), Federal Rules of Civil Procedure.

It is, therefore, ordered that the FDIC's Motion for Summary Judgment is granted.

Attorneys for the FDIC shall submit a proposed judgment and an affidavit in support of attorney fees on or before 3:00 p.m. on March 15, 1991. Plaintiffs shall have until 3:00 p.m. on April 1, 1991, to file any controverting affidavit.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated February 28, 1991.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC Resolution Fund as Receiver for Vernon Savings and Loan Association, FSA,	)	
Plaintiff,	)	Civil Action No. CA-3-89-0153-C
v.	)	
SELAIDEN BUILDERS, INC.; ROBERT SELAIDEN; CHARLES SELAIDEN; and JACK McJUNKIN, Jointly and Severally,	)	
Defendants.	)	

ORDER

(Filed July 3, 1990)

Pending before this Court are plaintiff's motion to sever filed on January 17, 1990; plaintiff's motion for summary judgment filed on January 17, 1990; defendants' motion for continuance to allow discovery filed on April 5, 1990; defendants' motion to strike affidavits filed on April 5, 1990; plaintiff's motion to lift stay and for reconsideration of order staying plaintiff's written discovery filed on April 18, 1990; and plaintiff's objection to and motion to strike affidavit of Jack McJunkin filed on April

25, 1990. After reviewing the motions, briefs, affidavits, and the record in the case, the Court is of the opinion that the motion to sever filed by the Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, as Receiver for Vernon Savings and Loan Association, FSA ("FDIC") should be GRANTED.

The plaintiff filed this action in January, 1989, seeking recovery on two promissory notes. Jack McJunkin, Charles Selaiden and Robert Selaiden filed their answers, and as well asserted a counterclaim and claim of offset against the Federal Savings and Loan Insurance Corporation, the predecessor to the plaintiff. The plaintiff has moved to sever the counterclaim and claim of offset of the three defendants which arises out of a RepublicBank/ Dallas promissory note, other than the two upon which the plaintiff seeks recovery. The Court, in its discretion, is of the opinion that the counterclaim and claim of offset should be severed. Such counterclaim and claim of offset raised by Jack McJunkin, Charles Selaiden and Robert Selaiden is hereby severed from the above-captioned action for separate disposition. Such severed action shall bear the style *Jack McJunkin, Charles Selaiden and Robert Selaiden v. the Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, F.S.A.* and be numbered CA 3-90-1649-C.

The FDIC, on the same date as the motion to sever was filed, filed a motion for summary judgment. After the motion for summary judgment was filed, the defendants moved to strike the affidavits filed in support of the FDIC's motion for summary judgment. The FDIC then moved to strike the supporting affidavit of Jack McJunkin. The Court is of the opinion that the motions to

strike filed respectively by both sides should be DENIED. The Court has noted the objections raised by the motions to strike and considered those objections when ruling on the motion for summary judgment and reviewing the response. The Court however denies the motions requesting the affidavits be stricken from the record.

The FDIC in its motion for summary judgment asserts there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. The Court DENIES the motion for summary judgment without prejudice, in all respects save the exception stated in the following paragraph, in that the record as it now stands does not support the FDIC's entitlement to summary judgment.

The Court however GRANTS the FDIC's motion for summary judgment finding the defendants' affirmative defense/counterclaim of breach of a duty of good faith and fair dealing is barred as a matter of law. This Court agrees with the opinion in *FSLIC v. Wilson*, 722 F.Supp. 306, 311 (N.D. Tex. 1989), finding that there is no duty of good faith and fair dealing flowing from the FDIC's predecessor FSLIC, (see the Financial Institutions Reform, Recovery and Enforcement Act of 1989, codified at 12 U.S.C. § 1821 *et seq.*) to the borrowers of a failed institution under Texas law. *See also, Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984). Accordingly, the affirmative defense/counterclaim of breach of duty of good faith and fair dealing is barred as asserted against the FDIC in this action.

The Court is of the opinion that the FDIC's motion to lift stay and for reconsideration of order staying plaintiff's written discovery should be GRANTED and it is so ordered. Therefore, in light of the denial without prejudice of the motion for summary judgment, the discovery which the FDIC requested and was stayed by Magistrate Sanderson's order dated March 29, 1990, shall proceed and the magistrate's order staying plaintiff's written discovery is set aside. Additionally, due to the denial of the motion for summary judgment, the Court finds that the defendants' conditional motion for continuance to allow discovery is moot.

Any relief not specifically herein granted is DENIED.

SO ORDERED.

Dated July 3, 1990.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC Resolution Fund as Receiver for Vernon Savings and Loan Association, FSA,	)	
Plaintiff,	)	Civil Action No. CA-3-89-0153-C
v.	)	
SELAIDEN BUILDERS, INC., et al.,	)	
Defendants.	)	

JUDGMENT

(Filed July 2, 1991)

Having granted Plaintiff's motion for summary judgment, the Court ORDERS, ADJUDGES AND DECREES that Plaintiff, Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, FSA, shall have judgment against Defendants, jointly and severally, as follows:

For the principal and accrued interest on the notes and guaranties (hereinafter respectiveiy referred to as the "principal amounts of the judgment"):

(1) of and from Selaiden Builders, Inc. the amount of $1,403,891.90, together with prejudgment interest from and including March 16, 1991, until the date of the signing

of the judgment in the amount of $304.77 per day;

(2) of and from Charles Selaiden the amount of $1,403,891.90, together with pre-judgment interest from and including March 16, 1991, until the date of the signing of the judgment in the amount of $304.77 per day;

(3) of and from Robert Selaiden the amount of $1,403,891.90, together with pre-judgment interest from and including March 16, 1991, until the date of the signing of the judgment in the amount of $304.77 per day; and

(4) of and from Jack McJunkin the amount of $842,335.14, together with pre-judgment interest from and including March 16, 1991, until the date of the signing of the judgment in the amount of $182.86 per day.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, FSA, shall have and recover judgment of and from each of the Defendants, jointly and severally, for attorneys' fees, costs, and expenses in the amount of $175,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Federal Deposit Insurance Corporation, as Receiver of Vernon Savings and Loan Association, FSA, shall have and recover judgment of and from each of the Defendants, jointly and severally, for interest at the rate of 6.39 percent per annum as post-judgment interest on the respective principal amounts of the judgment and on the amount of attorneys' fees, costs, and expenses adjudged above.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated July 2, 1991.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1815

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Manager of the FSLIC Resolution Fund
as Receiver for Vernon Savings and
Loan Association, FSA,

Plaintiff-Appellee,

versus

SELAIDEN BUILDERS, INC.,
ROBERT SELAIDEN, CHARLES SELAIDEN,
and JACK McJUNKIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Nov. 6, 1992)

Before WISDOM, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

APPENDIX F

RELEVANT STATUTORY PROVISIONS AND RULES

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the

> adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Tex. Bus. & Com. Code § 1.201(20) (Vernon Supp. 1993) provides:

> "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank.

Tex. Bus. & Com. Code 3.201(c) (Vernon 1968) and Comment 8 to such section provides:

> § 3.201. Transfer: Right to Indorsement
>
> * * *
>
> (c) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.
>
> Comment 8:
>
> The final clause of subsection [c], which is new, is intended to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in Section 3-307(2). The terms of the obligation do not run to him, and he must

account for his possession of the unindorsed paper by proving the transaction through which he acquired it. Proof of a transfer to him by a holder is proof that he has acquired the rights of a holder and that he is entitled to the presumption.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8259

F.D.I.C. AS RECEIVER FOR LAKELAND STATE BANK, Federal Deposit Insurance Corporation Receiver of Lakeland State Bank Austin, Texas In Its Receiver and Corporation Capacities,

Plaintiff-Appellee,

versus

FLOYD R. CLARK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CA-691)

(March 16, 1992)

Before BROWN, GARWOOD, and EMILIO M. GARZA, Circuit Judges.*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

PER CURIAM:

The summary judgment is reversed because there is no evidence that appellee is the owner or holder of the note. The mere opinion or conclusion of what the records show, expressed by a non-custodian affiant not employed until after the alleged transfer, establishes nothing, and was properly objected to below. The note copy does not reflect any endorsement to appellee, nor is any document, or copy or extract thereof, reflecting any transfer to appellee included in the record. Mere possession of the original of an unendorsed note payable to the order of another is not alone sufficient or *prima facie* evidence of ownership or being a holder. *See Jernigan v. Bank One*, 803 S.W.2d 774, 776-777 (Tex. App.—Houston, 14th Dist. 1991, n.w.h.); *Lawson v. Finance America Private Brands*, 537 S.W.2d 483 (Tex. Civ. App.—El Paso 1976, n.w.h.). All of the other arguments made by appellant here or below as to why appellee is or was not entitled to summary judgment are entirely without merit. The case is remanded for further proceedings, at which appellee will be entitled to judgment (summary or otherwise, as may be appropriate) if it establishes its ownership of the note.

REVERSED and REMANDED.